LIBRARY
SUPREME COURT, U. S.

No. 539

Office-Supreme Court, U.S.
FILED
AUG 30 1969
JOHN F. DAVIS, CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1969

THE NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC., *et al.*,

*Appellants,*

v.

MIDDLEWEST MOTOR FREIGHT BUREAU, *et al.*,

*Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA, FOURTH DIVISION

## JURISDICTIONAL STATEMENT

ARTHUR A. ARSHAM
233 Broadway
New York, N. Y. 10007

JOHN J. C. MARTIN
685 Third Avenue
New York, N. Y. 10017

RICHARD A. BOWMAN
300 Roanoke Building
Minneapolis, Minnesota 55402

*Attorneys for Appellants*

*Of Counsel:*

ARSHAM & KEENAN
233 Broadway
New York, N. Y. 10007

CANT, HAVERSTOCK, GRAY, PLANT & MOOTY
300 Roanoke Building
Minneapolis, Minnesota 55402

# INDEX


| | PAGE |
|---|---|
| Opinions Below | 2 |
| Jurisdiction | 2 |
| Question Presented | 3 |
| Statement | 4 |
| The Question Is Substantial | 8 |
| The Court Has Jurisdiction | 11 |
| Conclusion | 14 |
| Appendix A—List of parties | 1a |
| Appendix B—September 5, 1968 order | 3a |
| Appendix C—April 9, 1969 order | 12a |
| Appendix D—February 2, 1967 order | 18a |
| Appendix E—September 29, 1965 order | 24a |


## Table of Cases Cited


| | |
|---|---|
| American Trucking Associations v. United States, 364 U.S. 1 | 3 |
| Arkadelphia Milling Co. v. St. Louis S. W. R. Co., 249 U.S. 134 (1919) | 10 |
| Claridge Apts. Co. v. Comm'r, 323 U.S. 141 (1944) | 9 |
| I.C.C. v. Hoboken Mfrs. R. Co., 320 U.S. 368 (1943) | 8 |
| Inland Steel v. United States, 306 U.S. 153 (1939) | 9 |

PAGE

Public Service Commission v. Brashear Freight Lines, 312 U.S. 621 (1940) ..... 5, 10

Public Service Commission v. Brashear Freight Lines, 306 U.S. 204 (1939) ..... 12

Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co., 204 U.S. 426 (1907) ..... 9

United States v. Baltimore & O. R. Co., 284 U.S. 195 (1931) ..... 9

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1969

**No.** .....

THE NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC., *et al.*,

*Appellants,*

v.

MIDDLEWEST MOTOR FREIGHT BUREAU, *et al.*,

*Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA, FOURTH DIVISION

## JURISDICTIONAL STATEMENT

Appellants are 15 shipper organizations and two state public service commissions (listed in Appendix A) who intervened for the defendants in the action below instituted by appellees to enjoin an order of the Interstate Commerce Commission. This appeal is from the judgment of the district court dismissing the proceeding without prejudice to the plaintiffs. Appellants submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

## Opinions Below

Three opinions were rendered by the district court. The February 2, 1967 opinion is reported at 16 Fed.Carr.Cas. 81,769 and is attached as Appendix D (pp. 18a-23a). The September 5, 1968 opinion is reported at 1968 Fed. Carr. Cas. 82,028 and is attached as Appendix B (pp. 3a-11a). The April 9, 1969 opinion is unreported. It is attached as Appendix C (pp. 12a-17a). Also attached as Appendix E (pp. 24a-29a) is the district court's order of September 29, 1965 dissolving a temporary restraint on the Commission's order and denying an interlocutory injunction.

## Jurisdiction

This action was originally brought by motor carrier plaintiffs (the appellees) under 28 U.S.C. 1336, 1398, 2284, and 2321-2325 to set aside and enjoin permanently an order of the Interstate Commerce Commission directing the cancellation of rate increase schedules. The shipper appellants intervened in defense of the Commission's order and filed counterclaims for recovery on the injunction bond and for restitutional damages. By order of September 29, 1965 (App. E), the district court dissolved as unwarranted a temporary restraint on the Commission's order and denied an interlocutory injunction. By its order of February 2, 1967 (App. B), the district court sustained as proper the shippers' counterclaims and denied the carriers' motion to discharge the injunction bond without prejudice to renewal following the three-judge court's determination of the merits of the Commission's order. By its order of September 5, 1968 (App. C), made after notice

and hearing, the three-judge court dismissed the proceeding without prejudice to the plaintiffs and, declining appellants' request for a ruling on the merits of the complaint, summarily dismissed the counterclaims and discharged the injunction bonds. By its order of April 9, 1969 (App. D), the three-judge court withdrew a *nunc pro tunc* interpretation it had placed on a Commission order postponing cancellation of the carriers' schedules, but in all other respects adhered to and reaffirmed the judgment of dismissal of the proceeding without prejudice to the plaintiff carriers. From this judgment, the shipper organizations and the state public service commissions filed notice of appeal to the Supreme Court on June 9, 1969.

The jurisdiction of this Court to review the judgment of the district court on direct appeal is conferred by 28 U.S.C. 1253 and 2101(b). *American Trucking Associations v. United States*, 364 U.S. 1.

## Question Presented

In a suit by carriers to enjoin permanently a Commission order directing cancellation of rate increases, shipper intervenors counterclaimed to recover (under an injunction bond and on restitutional grounds) the increases collected while the Commission order was improvidently restrained. Did the three-judge court abuse its discretion in declining to rule on the merits of the complaint and by dismissing the proceeding without prejudice to the plaintiff carriers, denying the counterclaims, and discharging the injunction bond, all on the ground that the increases collected may be considered just and reasonable?

## STATEMENT

Rate increases effected by motor carriers were investigated by the Commission, found fatally deficient in evidentiary justification, and ordered cancelled by September 13, 1965 (325 I.C.C. 106). Denied postponement of the cancellation date, the carriers instituted this suit to set aside and enjoin the Commission's order. They sought and obtained a temporary restraining order, posting indemnity bonds for $300,000. By means of this restraint laid on the Commission's order, the carriers on and after September 13, 1965, continued to collect the rate increases ordered cancelled by the Commission. On September 29, 1965, the restraint was dissolved as unwarranted and interlocutory injunction was denied by the three-judge court, which saw no reasonable probability of success in plaintiffs' suit i.e. no likelihood that the Commission's determination would be overruled by the court. (App. E p. 28a). Nevertheless, in its penultimate and final orders (App. B & C) the district court reached a result no different in its consequences for the parties (plaintiff-carriers as well as intervenor-shippers) than if it had overruled and set aside the Commission's determination. Declining shippers' requests to adjudicate the merits of the injunction suit, it dismissed the proceeding without prejudice to the plaintiff-carriers, and with it, the shippers' counterclaims and the injunction bond.

The court's decision was hinged to an order issued by the Commission on September 30, 1965 postponing for 11 days the date fixed for cancellation of the increase schedules. That order came on the scene in the following circumstances. Liquidation on September 29th of the re-

straint, placed the carriers instantly under the mandate of the Commission's order to cancel the increase schedules. Denied a further stay by the court, the carriers applied to the Commission for time to publish cancellation tariffs. On September 30th, the Commission issued an order that postponed to October 11, 1965 the date for cancellation of the increase schedules. This order made no change in the Commission's substantive determination. It expressly stated that there was to be no change in the requirements of its July 23, 1965 order finding the rate increases unjustified and directing their cancellation. It explicitly authorized re-establishment of the rates that predated the increases at the earliest possible moment, i.e. "upon not less than one day's notice." The Commission's sole purpose in issuing the September 30th order was to give the carriers 11 days within which to print, publish, and effectuate cancellation schedules. So viewed by all the parties, the September 30th order was accorded no special significance when, in February 1967, the carriers presented a motion to the district court. By that time they had effected cancellation of the increase schedules and soon thereafter published new increases that restored their revenues. Thy had no further use for the injunction suit and wanted nothing more than release from the liability they asssumed on the injunction bond and the counterclaims. They moved the court to discharge their bond and to dismiss the counterclaims.

This was refused the carriers by the district court which articulated the rule endorsed by this Court in *Public Service Commission* v. *Brashear*, 312 U.S. 621 (1941). It held that the counterclaim for restitution was entirely proper, being based on damage suffered by the shippers in being

required to pay higher rates as a result of the restraint placed on the Commission's order; that the injunction bond was conditioned on "final affirmance" of the Commission's order. Both these issues required an adjudication by the three-judge court on the merits. Plaintiff's motions were denied and there was reserved for subsequent determination the issue of the merits of the complaint. (*infra* pp. 22a-23a).

This was the posture of the parties when in July 1968, the shipper-intervenors moved the court to set the case for hearing on the merits. At that hearing, held on July 9, 1968, the court suggested that the Commission's order postponing the cancellation date to October 11, 1965, operated not simply from the date of its issuance on September 30, 1965 but retroactively to September 13th. This suggestion was resisted by all the parties, including the United States and the Interstate Commerce Commission and even, initially, by the plaintiff-carriers themselves. Nevertheless, in the memorandum opinion issued September 5, 1968 (App. B), the Commission's order of September 30th became the *deus ex machina* for disposition of all the issues in the proceeding. The order was viewed by the district court as a sort of general amnesty to which it imparted retroactive effect. Thus, it said, no damage was inflicted on the shippers by a restraint that barred enforcement on September 13, 1965 of the order to cancel increases, for the reason that the postponement order of September 30, 1965 was effective *nunc pro tunc*, so that the rate increases ordered cancelled by September 13th were legitimatized by the order of September 30th. Holding issues in the complaint to have become moot, since plaintiffs no longer needed the relief they sought, the court dis-

missed the proceeding without prejudice to the plaintiffs, and with it the counterclaims and the bond.

Shipper intervenors, joined by the United States, both in its capacity as a defendant and *qua* shipper, moved for rehearing in the district court. The court on rehearing issued its April 9, 1969 order (App. C). This quoted from a joint statement of position filed by the United States and the Interstate Commerce Commission:

> "Contrary to this court's reading of the Commission's order of September 30, 1965, the Commission by entering that order did not approve or prescribe the higher rates during the interim period from September 13 to October 11, 1965."

Confronted by the Commission's own declaration of purpose, the court recognized this as disagreement with the court's interpretation of the order of September 30th. Nevertheless, the court held that its construction of the order was "fully consonant with the language of the order." Weighing various events such as effectuation of new increases on November 16, 1965, the court concluded that the increased rates collected by the carriers from September 13 to September 30, 1965 "in light of the entire record and attendant circumstances, should not be considered as unjust and unreasonable by this court.". It thereupon reaffirmed its earlier disposition of dismissal of the proceeding without prejudice to the plaintiffs, discharged the bond, and dismissed the counterclaims.

From such judgment and orders, the shipper-intervenors filed appeal to this Court and at the same time noticed a precautionary appeal to the Court of Appeals for the Eighth Circuit. The United States *qua* shipper filed an

appeal to this Court and concurrently to the Court of Appeals for the Eighth Circuit. These are discussed below.

## The Question Is Substantial

The decision of the court below, in one inclusive sweep, undertakes to dispose of all the issues generated by the carriers' resort to the extraordinary remedy of injunction, including such collateral matters as carrier liability on the injunction bond and counterclaims for restitution. A critical issue was the lawfulness of the increased rate level from September 13 to September 30, 1965. This too the district court swept up in its decision dismissing the proceedings; it found this rate level, during this period, just and reasonable. In so doing, the district court obliterated the sharp lines of juridical authority, plainly marked out by the decisions of this Court.

A formidable array of decisions challenges the adjudication of the lower court. *I.C.C.* v. *Hoboken Mfrs. R. Co.*, 320 U.S. 368 (1943) will not permit a cause to be declared moot so long as some propertied right calls for protection. If a single deprivation remains to be compensated, "to that extent at least, the case is not moot." Here, the carriers' injunction suit, if liquidated, would leave in its wake the uncompensated damage visited on shippers by an improvident restraint that enabled the carriers to continue to exact rate increases found unjustified and ordered cancelled. To validate a disposition based on mootness, the district court had to find some way to dispose of the injunction bond and counterclaims. It thought it discovered an avenue in the Commission's order of postponement issued September 30,

1965 which it interpreted to reach backwards from the date of issuance in order to legalize rates ordered cancelled September 13, 1965. In *Claridge Apts. Co.* v. *Comm'r,* 323 U.S. 141, 164 (1944) this Court said:

> "Retroactivity, even where permissible is not favored, except upon the clearest mandate."

*Brimstone R & Co.* v. *United States,* 276 U.S. 104, 122 (1928) and *United States* v. *Baltimore & O. R. Co.,* 284 U.S. 195, 203 (1931) are leading exponents of a long line of decisions to the same effect. *Inland Steel* v. *United States,* 306 U.S. 153 (1939) is specific in its holding that a Commission postponement order cannot be given retroactive effect. The *nunc pro tunc* meaning read by the lower court into the Commission's order of September 30th cannot co-exist with authorities such as these.

When confronted by the Commission's repudiation of a retroactive purpose, the court below shifted from *nunc pro tunc* grounds to a new basis for extinguishing shipper claims under indemnity bond and counterclaim. It weighed various events proximate to issuance of the September 30th order (e.g. effectuation of new increases in November 1965), then found and concluded that increased rates collected by the carriers between September 13 and September 30, 1965 were just and reasonable. At this late date in the history of administrative law, it scarcely seems necessary to obtain re-affirmation from this Court of the principle that it is for the Commission, and not a reviewing court, to determine whether a rate is or was just and reasonable. In 1907, *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.,* 204 U.S. 426, established the doctrine of the Commission's exclusive primary jurisdiction to determine such issues. That jurisdiction was exercised by the Commission in this case; rate increases were found not shown just and reason-

able; cancellation was ordered on September 13th, so that the reach of the Commission's order embraced the full period from September 13 to September 30, 1965. The district court assigned no error to that determination by the Commission. It cited no basis for overruling that decision of the Commission. Yet, it did exactly that—it overruled the Commission—when it found and concluded that increased rates collected by the carriers between September 13 and September 30 "should not be considered as unjust and unreasonable by this court."

These conflicts with the cases were attended by multiple departures from the accepted course of judicial proceedings reflected in the holdings of *Arkadelphia Milling Co.* v. *St. Louis S. W. R. Co.*, 249 U.S. 134 (1919) and *Public Service Commission* v. *Brashear Freight Lines, supra.* Although the *Abilene* doctrine may not require restatement at this late hour, urgently needed from this court is affirmation of the integrity of the scheme of judicial review when applied in the developing law of motor carrier regulation. Peremptory dismissal by the three-judge court of causes that are reserved for trial and decision by a single judge, *after* adjudication by the three-judge court of the merits of the injunction suit, is more than a derangement of the ordered sequences prescribed by *Brashear.* It works a denial of due process. Shipper-intervenors were deprived of the opportunity to document their counterclaim by evidence. Such evidence would have disclosed the true meaning of events proximate to the September 30th order of postponement. Such evidence would have revealed the counterclaim demonstrably well founded.

In the end these departures from the accepted course of judicial proceedings subvert the process of judicial review

by underwriting exploitation by the carriers of the extraordinary remedy of injunction to enable them to continue to exact, a little while longer, rate increases condemned under 49 U.S.C. § 316(g) as not proven lawful and ordered cancelled. Appellants suggest that the question presented is substantial and merits plenary review by this Court.

## This Court Has Jurisdiction

There remains for consideration the matter of the Court's jurisdiction to entertain this issue as a direct appeal. 28 U.S.C. 1253 provides for direct appeal to the Supreme Court from an order "granting or denying . . . injunction" in a suit required to be heard and determined by a three-judge court. The court below dismissed the proceeding as moot and without prejudice, i.e. without adjudicating the merits; and dismissed appellants' counterclaim on the indicated ground that the increased rates were not unjust or unreasonable for the period from September 13 to September 30, 1965. If this is denial of an injunction which had been sought by the carrier-appellees, then appellants have no standing to invoke this court's jurisdiction. If this is the granting of an injunction, appellants have standing and this Court has jurisdiction.

If the order below is neither the grant nor the denial of an injunction, the words of the Judicial Code appear to foreclose this Court's jurisdiction on appeal. Appellants suggest that so restricted a meaning should not be imparted to the provision and appellees, in fact, have taken a position that accords with this view. The United States as shipper appeared below in support of the Commission's order, filed a counterclaim, and appealed from the final

order and judgment of the district court both to this Court and to the Court of Appeals. It subsequently withdrew its appeal to the Supreme Court. Appellees then moved in the district court to dismiss the Government's appeal to the Court of Appeals on the ground that the Court of Appeals lacks jurisdiction. They must therefore contend and concede that appellate jurisdiction lies directly with this Court.

Appellees say, in their motion against the United States below, that "a judgment on the complaint adverse to plaintiffs [and] sustaining the order of the Interstate Commerce Commission of February 24, 1965, is an essential condition precedent to the relief" sought by a counterclaim such as that filed by the Government and by these appellants. Failing such an order, and failing the Government's appeal of the denial of such an order to this Court, appellees say the Court of Appeals lacks jurisdiction. They appear, therefore, to concede that the *Brashear* decisions* are distinguishable. In *Brashear* the district court *gave* judgment on the merits adverse to plaintiffs but denied defendants' counterclaim. Appellate jurisdiction over the counterclaims was then allocated to the Court of Appeals. However, as appellees insist, the district court has *refused to grant* judgment on the merits, and precisely for this reason appellees must say appellate jurisdiction lies nowhere but with this Court. Appellants agree.

Another and even stronger reason compels this conclusion. Appellees sought below an injunction vacating the Commission's order or rate cancellation for all periods in the future extending beyond its effective date. The effect

---

* *Public Service Commission* v. *Brashear Freight Lines*, 306 U.S. 204 (1939); 312 U.S. 621 (1941).

of that injunction would be to allow appellees to apply the increased rate level after September 13, 1965. They did apply it for part of that period, until September 30, 1965. The court below ruled such application was lawful on the basis of its view that the rates were just and reasonable for that period.* The Commission's order, however, ruled that these rates had not been shown just and reasonable.

In sum, the counterclaim could not be dismissed below without a finding that the rates were just and reasonable from September 13 to September 30, 1965. Such a finding could not be made without overruling in part the Commission's finding that the rates had not been shown just and reasonable. The Commission's finding could not thus have been overruled without granting an injunction which, *pro tanto*, vacated and amended an order of the Commission.

This appeal is, therefore, from a partial grant of the injunction which appellees sought below, a grant which issued in the form of dismissal of the "proceeding" without prejudice coupled with dismissal of appellants' counterclaim with prejudice. The Court has jurisdiction of this appeal.

---

* The district court's words were, "We conclude and find, therefore, that the rates charged by the carriers from September 13 to September 30, 1965, in light of the entire record and attendant circumstances, should not be considered as unjust and unreasonable by this court." This is in essence and effect a finding that the rates, for the September period, *were* just and *were* reasonable. This follows necessarily from the facts that the Commission had found them not shown just and reasonable, that appellees had the burden before the Commission, and that nothing could warrant reversal of the Commission's order except the carriage of that burden to a finding that the increased rates *were* just and reasonable.

## CONCLUSION

**Appellants suggest that the question presented by this appeal is substantial and that this Court has jurisdiction to entertain it on direct appeal. Probable jurisdiction should be noted and the judgment of the district court should be vacated and reversed.**

Respectfully submitted,

ARTHUR A. ARSHAM
233 Broadway
New York, N. Y. 10007

JOHN J. C. MARTIN
685 Third Avenue
New York, N. Y. 10017

RICHARD A. BOWMAN
300 Roanoke Building
Minneapolis, Minnesota 55402

*Attorneys for Appellants*

*Of Counsel:*

ARSHAM & KEENAN
233 Broadway
New York, N. Y. 10007

CANT, HAVERSTOCK, GRAY, PLANT & MOOTY
300 Roanoke Building
Minneapolis, Minnesota 55402

August 29, 1969

## APPENDIX A

### List of Parties

APPELLANTS (Intervenors for Defendants below)

The National Small Shipments Traffic Conference, Inc.
The Drug and Toilet Preparation Traffic Conference
Nebraska State Railway Commission
North Dakota Public Service Commission
Aberdeen Chamber of Commerce
Iowa Industrial Traffic League
Chamber of Commerce of Fargo
Chamber of Commerce of Grand Forks
Lincoln Chamber of Commerce
Minneapolis Traffic Association
Omaha Chamber of Commerce
St. Joseph Chamber of Commerce
Traffic Bureau of Sioux Falls
Waterloo-Cedar Falls Traffic Association
Western South Dakota Traffic Bureau
Diana Manufacturing Company
Wisconsin Manufacturers' Association

APPELLEES (Plaintiffs below)

Middlewest Motor Freight Bureau
Admiral-Merchants Motor Freight, Inc.
Brady Motorfrate, Inc.
Briggs Transportation Co.
Bruce Motor Freight, Inc.
Eugene Pikovsky, an individual doing business as Freight Transit Co.
Glendenning Motorways, Inc.

Hart Motor Express, Inc.
Hyman Transportation Company
Mercury Motor Freight Lines, Inc.
Midwest Motor Express, Inc.
Minnesota-Wisconsin Truck Lines, Incorporated
Murphy Motor Freight Lines, Inc.
Olston Transportation Company.
Raymond Motor Transportation Inc.
All-American Transport, Inc.
Witte Transportation Company

DEFENDANTS (below)

United States of America
Interstate Commerce Commission

## APPENDIX B

### Order of September 5, 1968

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

FOURTH DIVISION

4-65 Civ. 285

---

Middlewest Motor Freight Bureau, et al., Plaintiffs, vs. United States of America and Interstate Commerce Commission, Defendants, and The National Small Shipments Traffic Conference, Inc., et al., Intervenors.

---

MEMORANDUM ORDER

Before:

BLACKMUN, *Circuit Judge*, DEVITT, *Chief District Judge*, and NORDBYE, *District Judge*.

---

NORDBYE, District Judge.

This long and unduly protracted proceeding had its genesis in the United States District Court for the District of Minnesota on September 9, 1965, when that court, upon the complaint and motion of the plaintiffs and upon condition that a bond in the sum of $200,000 be filed, entered a temporary restraining order enjoining the Interstate Commerce Commission and the United States from enforcing an order of February 24, 1965, 325 ICC 106, wherein the Commission in the proceeding designated as I. & S.

Docket No. M-17450, LTL Class Rates and Minimum Charges—Midwest and Central Territories, determined that certain schedules for increases in less than truck load class rates and minimum charges filed by plaintiffs were "not shown to be just and reasonable." The proposed rate schedules of the plaintiffs were to become effective on July 1, 1963, but by order of the Commission on June 26, 1963, the schedules were stayed. Several orders were thereafter entered by the Commission with respect to these proposed rate schedules, and later the date for compliance with the report and order of the Commission was made on February 24, 1965, but by subsequent order the compliance was postponed to September 13, 1965. The effective date of the temporary restraining order of September 9, 1965, was September 13, 1965.

A hearing was held on September 16 and 17, 1965, before the District Court at which time various shipping associations, Chambers of Commerce, and shippers which were parties to the proceedings before the Commission in No. M-17450 were permitted to intervene herein. On September 20, 1965, the District Court made its order extending its temporary restraining order pending a motion of the plaintiffs for an interlocutory injunction before a three-judge court upon the condition that increased substituted bonds in the amount of $300,000 in the form to be approved by the court be filed by the plaintiffs. The plaintiffs filed two new bonds, one for $100,000 and the other for $200,000. These bonds filed as a condition for the granting of the temporary restraining order provided that

> "Now, Therefore, the condition of this obligation is such that if the order of the Interstate Commerce Commission entered in its docket I & S M-17450 on

February 24, 1965, shall be finally affirmed, then if plaintiffs shall well and truly pay, or cause to be paid, to any and all consignors, consignees and others, any costs or damages sustained by reason of all sums paid in excess of rates or charges which would have been applicable on September 13, 1965, and thereafter in compliance with the Interstate Commerce Commission's said order, then this obligation shall be void; otherwise it shall remain in full force and effect."

This proceeding initially came before this three-judge court on September 24, 1965, on plaintiffs' motion for a temporary injunction, and on that date, after argument, this court orally denied plaintiffs' motion for a preliminary injunction and stated that on intervenors' motion the temporary restraining order heretofore entered by the District Court would be dissolved. Thereupon plaintiffs requested a stay of five days, and it was on September 29, 1965, that this court by written order denied plaintiffs' motion for a temporary injunction and dissolved the temporary restraining order.

The issue as to the validity of the Commission's order of February 24, 1965, and the liability, if any, of the plaintiffs and their surety to these intervenors under the bonds filed as a condition for the issuance of the temporary restraining order came before this three-judge court on July 9, 1968. Plaintiffs made a motion to dismiss the complaint without prejudice, discharge the bonds, and to strike the counterclaim. The defendants and intervenors sought a denial of plaintiffs' motions and an affirmance of the Commission's order requiring cancellation of the rates which were not found to be just and reasonable by the Commission's order of February 24, 1965. The

intervenors further seek appropriate accounting under the injunction bonds and for a restitution of the moneys collected by the plaintiffs and other carriers participating in the tariffs involved in excess of that which would have been legally chargeable by them under the Commission's order of February 24, 1965, during the period from September 13, 1965, to September 29, 1965, inclusive. At the hearing of July 9, 1968, it appeared that plaintiffs had obtained new rates from the Commission which became effective November 16, 1965, and that these new rates gave plaintiffs a rate schedule which granted the carriers a return in excess of the rates which the Commission found in its February 24, 1965, order as lacking a showing which would justify a finding that the proposed rates were "just and reasonable." It appears that following this court's denial of the preliminary injunction and the discharge of the temporary restraining order, plaintiffs sought and obtained on September 30, 1965, an order from the Interstate Commerce Commission which reads:

"INTERSTATE COMMERCE COMMISSION

I. & S. Docket No. M-17450

LTL Class Rates and Minimum Charges—
Midwest and Central Territories

Present: Charles A. Webb, Chairman, to whom the matter which is the subject of this order has been assigned for action thereon.

Upon consideration of the record in the above-entitled proceeding; the institution on September 9, 1965, of an action before the United States District Court for the District of Minnesota, Civil Action No.

4-65 Civil 285, *Middle West Motor Freight Bureau,* et al. v. *United States,* to set aside the report and order of the Commission, entered February 24, 1965, in the above-entitled proceeding; the denial by the three-judge court on September 24, 1965, of plaintiffs' Motion for Interlocutory Injunction; and good cause appearing therefor:

*It is ordered,* That the date on which the respondents are required to cancel the schedules at issue in the above-entitled proceeding, established as September 13, 1965, by order of the Commission entered July 23, 1965, be, and it is hereby, postponed to October 11, 1965, without change in the requirements of said order;

It is further ordered, That the respondents be, and they are hereby authorized, to reestablish such rates and provisions as were in effect prior to the issuance of the suspension order in this proceeding, upon not less than one day's notice to the Commission and the general public by filing and posting in the manner prescribed by the Commission under Section 217 of the Interstate Commerce Act.

Dated at Washington, D. C., this 30th day of September, A. D. 1965.

By the Commission, Chairman Webb.

(Signed) H. NEIL GARSON
H. Neil Garson
Secretary"

(SEAL)

At the outset we are confronted with plaintiffs' motions which give rise to the question as to the mootness of the proceedings instituted by them on September 9, 1965, wherein they sought to set aside, vacate and annul the order of the Interstate Commerce Commission of February 24, 1965 (as amended by its order of July 23, 1965), and permanently enjoin the Commission from enforcing or attempting to enforce said order. In that it appears that plaintiffs have now obtained an adequate rate relief from the Commission, they are not interested in seeking any equitable relief from this court as to the February 24, 1965, order of the Commission or otherwise. Obviously, in light of the record, the issues between plaintiffs and the Interstate Commerce Commission and the United States have become moot, and a dismissal should be granted unless the intervention of the intervenors with their counterclaims requires a finding of this court as to the merits of plaintiffs' action against the Commission as a condition precedent to the enforcement of said counterclaims. Certainly, this court has ancillary jurisdiction, at least as to the counterclaims filed. On the other hand, if upon the admitted facts the counterclaimants have no enforcible claims against plaintiffs or their surety, no purpose will be served in passing upon the merits of plaintiffs' complaint in that these entire proceedings would then be moot and plaintiffs' motions should be granted.

This brings us to the effect of the Commission's order of September 30, 1965. It is not contended that this order was intentionally directed by the Commission to the question of any liability which might be enforced by the intervenors against the plaintiffs or their surety by reason of this court's denial of the temporary injunction and the

discharge of the temporary restraining order. However, it is clear that the Commission's order of September 30, 1965, did authorize these carriers to charge the challenged rate from September 13, 1965, to October 11, 1965, which not only encompassed the period of the temporary restraining order, but for some days beyond. And in making the order of September 30, 1965, it seems reasonable to conclude that the Commission determined that it would be inequitable to require the carriers to revert to the September 7, 1963, rate without affording them a reasonable period to continue with the challenged rate so that they could proceed with an application for increased rates. And the fact that as of November 16, 1965, the carriers were granted rate increases by the Commission which exceeded the return afforded by the challenged rates tends to confirm a finding that the Commission, with the other circumstances in support of the plaintiffs' petition, recognized the economic effect of the passage of some two years since the challenged rates were first promulgated, to the extent that rate relief should be granted to the plaintiffs. In any event, the contention made by the intervenors that the Commission's order of September 30, 1965, merely intended to continue the challenged rates from September 30, 1965, to October 11, 1965, is clearly contrary to the express terms of the order. Where it appears that the September 30, 1965, order of the Commission approved the collection by the carriers of the challenged rates from September 13, 1965, to October 11, 1965, it necessarily follows that the temporary restraining order of the District Court did not inflict any damages to these intervenors. The intervention of the Commission in approving the collection of the challenged rates by the carriers from September 13, 1965, to October 11, 1965, rendered the tem-

porary restraining order ineffective as a proximate cause of any rate damages to these intervenors. The delay of the plaintiffs in not effecting the date of the new rates until November 16, 1965, is of no concern in these proceedings.

The surety bonds filed by the carriers afford the intervenors no right against these plaintiffs or their surety unless the carriers by reason of the temporary restraining order charged higher rates than were legally justified. The intervenors' position necessarily must be that the court should affirm the Commission's order of February 24, 1965, and hold that the carriers should be relegated to the collection of the September 7, 1963, rates during the period of the temporary restraining order and their damages determined accordingly notwithstanding the Commission's order of September 30, 1965. It seems evident that the position of the intervenors is clearly untenable and cannot be sustained. We cannot say that the carriers should have charged the September 7, 1963, rates during the continuance of the temporary restraining order when the Commission had intervened thereafter and with its superior expertise has held that the carriers should continue with the challenged rate during that period. The undeniable fact is that these intervenors during the injunction period did not pay any freight charges to these carriers which exceeded the rates set by the Commission. The granting of the temporary injunction inflicted no damage to them rate-wise. It is for the Commission to determine the legal rates during this period, and this it did by its *nunc pro tunc* order of September 30, 1965. Under the admitted facts, therefore, we are constrained to find that the issues in the complaint have now become moot. This necessarily follows because plaintiffs have ob-

tained the rate relief from the Commission which they have requested. They are not interested, therefore, in seeking any relief from this court on their complaint against the Commission. Furthermore, in that plaintiffs have not collected any illegal or unlawful rates during the period of the temporary restraining order by reason of the intervention of the Commission's order of September 30, 1965, it must follow that no right of recovery exists in the counterclaims of these intervenors or others for whom they appear as against the plaintiffs or their surety.

The court adopts the foregoing as its Findings of Fact, and as Conclusions of Law,

It is ORDERED that the above proceeding is dismissed without prejudice, and that the counterclaims of the intervenors, and each of them, are dismissed and the surety bonds filed herein by the plaintiffs as a condition for the granting of the temporary restraining order by the District Court are dismissed and discharged. Judgment will be entered accordingly. Exceptions are reserved.

Dated this 5th day of September, 1968.

HARRY A. BLACKMUN
*United States Circuit Judge*

EDWARD J. DEVITT
*United States District Judge*

GUNNAR H. NORDBYE
*United States District Judge*

# APPENDIX C

## Order of April 9, 1969

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

FOURTH DIVISION

4-65 Civil 285

---

Middlewest Motor Freight Bureau, et al., Plaintiffs, vs. United States of America and Interstate Commerce Commission, Defendants, and The National Small Shipments Traffic Conference, Inc., et al., Intervenors.

---

MEMORANDUM ORDER

Before:

BLACKMUN, Circuit Judge, DEVITT, Chief District Judge, and NORDBYE, District Judge.

---

PER CURIAM:

The intervenors have filed motions for amended findings of fact, conclusions of law and order for judgment entered by this court on September 5, 1968, or for a new trial. The United States as a shipper has joined in these motions. In that the court's order of September 5, 1968, was based primarily upon its interpretation of the order of the Interstate Commerce Commission entered September 30, 1965, the United States of America, as statutory defendant, and the Interstate Commerce Commission,

neither supporting nor opposing the intervening defendants' position herein, filed in this proceeding a joint statement of position on November 14, 1968, which reads, in part,

> "That the Commission's order was entered only as a result of this Court's stay is clear from the history of the Commission's prior denial of the motor carriers' request for postponement of the effective date of the Commission report and order requiring the cancellation of the motor carriers' rate increases. Briefly, by order served August 4, 1965, the Commission denied the petition for reconsideration of the Middlewest Motor Freight Bureau. On August 18, 1965, the Bureau filed a 'Petition for Immediate Postponement of Compliance Date and For Rehearing.' By an order of August 30 (served August 31), the entire Commission denied this petition 'for the reason that sufficient grounds have not been presented to warrant granting the action sought.' On August 30, counsel retained by the Bureau wrote then Chairman Webb concerning this petition. • • • In this letter, referred to at the oral argument by defendants (transcript, at 38), counsel requested a meeting of the parties with the Chairman or with the Commission, urged that the Commission grant a rehearing, and in effect, requested that the Commission voluntarily stay its September 13 compliance date. In his reply of September 2, 1965, • • • Acting Chairman Bush noted that the order served August 31 denying the Bureau's petition seemed to have obviated the value of such a meeting. He further observed that in light of the reason for the Commission's denial, the Bureau, after con-

plying with the order requiring cancellation, might wish to file new rate schedules. In conclusion, Acting Chairman Bush observed that the Bureau's alternative was to seek judicial review—the course the Bureau chose to pursue.

"Contrary to this Court's reading of the Commission's order of September 30, 1965, the Commission by entering that order did not approve or prescribe the higher rates during the interim period from September 13 to October 11, 1965. Under the statutory scheme, specifically Section 216, 49 U.S.C. §316, carriers initiate and publish rates which remain in force so long as a Commission order requiring their cancellation has not become effective."

It is apparent that the United States and the Interstate Commerce Commission have made it clear that they disagree with this court's interpretation of the Commission's order of September 30, 1965, as stated by this court in its order of September 5, 1968. In view thereof, we accept the portion of the order of the Commission wherein it stated that by entering the order of September 30, 1965, it "did not approve or prescribe the higher rates during the interim period from September 13 to October 11, 1965," and that "under the statutory scheme, specifically Section 216, 49 U.S.C. §316, carriers initiate and publish rates which remain in force so long as a Commission order requiring their cancellation has not become effective." However, we are of the opinion that the construction given by this court in its order of September 5, 1968, to the Commission's order of September 30, 1965, is fully consonant with the language of that order. Certainly, the Commission had authority to continue the challenged rates in

effect from September 13 to September 30, 1965, although the term "nunc pro tunc" as used by this court in its order of September 5, 1968, may be inappropriate and may be stricken. The carriers were permitted by the Commission to charge their published rates until September 13, 1965, although the Commission found that the carriers had not sustained the burden of proof in establishing the rates as just and reasonable. In entering the order of September 5, 1968, this court concluded that it was highly improbable that the Commission intended that there should be any break in the carriers' rates from September 13 to September 30, 1965, when the Commission apparently contemplated that new rates would come into effect not later than October 11, 1965. Regardless of whether the Commission did or did not by its order of September 30, 1965, "approve or prescribe" the higher rates from September 13 to October 11, 1965, we cannot escape the reasonable and persuasive conclusion that it would be highly inequitable for this court to order restitution to the shippers between September 13 and September 30, 1965, for the difference between the rates of September 6, 1963, and the challenged higher rates when admittedly the Commission intended by its order of September 30, 1965, that from September 30, 1965, to October 11, 1965, the higher rates should be approved.

The order of cancellation by the Commission of the challenged rates in question did not become effective on September 13, 1965, by reason of the restraining order issued by one of the judges of this court. The carriers therefore continued to charge their published rates from September 13, 1965, to September 30, 1965, and it must be recognized that these rates never have been pronounced unlawful by the Commission. It is our view, therefore,

that notwithstanding the Commission's interpretation of its order of September 30, 1965, it does not follow from the entire record herein that these challenged rates were unjust and unreasonable during the period from September 13 to September 30, 1965, so as to justify the relief which the intervenors request. If the equities of the entire situation and the inadequacy of the September 6, 1963, rates justified the Commission's order permitting the challenged rates to become effective between the date of its order and October 11, 1965, it would be highly inequitable for this court to relegate the carriers to rates which admittedly were substantially lower than those which the Commission approved on November 16, 1965. The respite given by the Commission to the carriers to continue with the challenged rates from September 30 to October 11, 1965, strongly suggests that the Commission recognized that the lapse of time and the continued changing economic factors justified the relief which it afforded to the carriers in its order of September 30, 1965. The restraining order, therefore, issued by this court, in light of the history of these proceedings, should be recognized as a continuance of the legally published rates and as effecting the same purposes and equities which the Commission achieved in its order of September 30, 1965. We conclude and find, therefore, that the rates charged by the carriers from September 13 to September 30, 1965, in light of the entire record and attendant circumstances, should not be considered as unjust and unreasonable by this court.

When the court used the term "intervenors" in its order of September 5, 1968, it intended to include the United States qua shipper and the order of September 5, 1968, may be amended accordingly.

It follows, therefore, that although we depart as stated herein from our interpretation of the Commission's order of September 30, 1965, as set forth in our order of September 5, 1968, in view of the entire record we adhere to the remaining findings of fact and conclusions of law set forth therein. Therefore, the motions of the intervenors and the United States qua shipper are in all things denied. It is so ordered. Exceptions are reserved. It may be noted that so far as the order of the District Court of February 2, 1967, in the above proceeding conflicts with this court's views as set forth in its order of September 5, 1968, or the views herein, it necessarily follows that to the extent of any conflict the order of February 2, 1967, is overruled.

This order is hereby made a part of the Findings of Fact, Conclusions of Law and Order for Judgment entered herein on September 5, 1968. It is so ordered.

Dated this 9th day of April, 1969.

HARRY A. BLACKMUN
United States Circuit Judge

EDWARD J. DEVITT
United States District Judge

GUNNAR H. NORDBYE
United States District Judge

## APPENDIX D

### Order of February 2, 1967

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

4-65 Civ. 285

Middlewest Motor Freight Bureau, et al., Plaintiffs, vs. United States of America and Interstate Commerce Commission, and The National Small Shipments Traffic Conference, Inc., et al., Intervenors.

ORDER

This proceeding comes before the Court on a motion by the plaintiffs to strike the intervenors' counterclaim and to discharge or modify their bond. Plaintiff carriers filed a complaint in this Court on or about September 9, 1965, attacking the validity of an order of the Interstate Commerce Commission dated February 24, 1965, No. M-17450, *LTL Class Rates & Minimum Charges Between Midwest and Central Territories*, 325 I.C.C. 106, and in conjunction therewith, obtained a Temporary Restraining Order suspending the Interstate Commerce Commission order's effective date. Various shipping associations, Chambers of Commerce and shippers which were parties to the Interstate Commerce Commission proceeding thereupon moved to intervene pursuant to their statutory right under 28 U.S.C.A. § 2323, which motion was granted by this Court on September 17, 1965. At the same time plaintiffs' motion

to extend the Temporary Restraining Order pending the hearing on their motion for a Preliminary Injunction was also granted, but only upon the express condition that a bond or bonds in the amount of $300,000 in the form required by the Court be obtained. Subsequently, on September 24, 1965, plaintiffs' motion for a Preliminary Injunction was denied and on September 29, 1965, the Temporary Restraining Order was dissolved.

The first question confronting this Court is whether the motion of the plaintiffs to dismiss the counterclaim of the intervenors and to discharge or modify the bond is premature. The bond filed by the carrier plaintiffs in this action provided that the shippers which had to pay higher rates while the Temporary Restraining Order was in effect could recover on the bond only if the order of the Interstate Commerce Commission was finally affirmed and the plaintiffs failed to "well and truly" pay the shippers their costs and damages sustained by reason of the Temporary Restraining Order. Up to the present time, no three-judge Court has met to determine whether in fact the order of the Interstate Commerce Commission was correct based upon the evidence before it and, therefore, there has been no final affirmance as required under the terms of the bond. Before attempting to dispose of issues regarding the nature of the bond, this Court is of the opinion that a three-judge Court should meet and proceed to determine the merits of the plaintiffs' action. When that question has been disposed of by the three-judge Court, then this Court, if the Commission's order is sustained, will have to determine the issues now raised by the plaintiffs' motion regarding the bond. At the present posture of this case, plaintiffs' motion to discharge or modify the bond is premature.

The plaintiffs have argued that they do not wish to proceed with their action before a three-judge Court in view

of the fact that that Court could not afford them any relief which they have not obtained already from the Interstate Commerce Commission. Following the three-judge Court's denial of the Preliminary Injunction, the plaintiffs sought and obtained from the Interstate Commerce Commission on September 30, 1965, an order postponing the prior order of the Commission (this prior order had ordered the cancellation of proposed increased rates). The Commission also established a new compliance date for the cancellation of the tariffs in question, but it also provided that concurrently with the cancellation of the objectionable rates, the plaintiffs could publish new schedules to supplant those which were to be cancelled. The plaintiffs did publish new rates and they became effective on October 11, 1965. These new rates still remain in effect at the present time and apparently provide the plaintiffs with the revenue they had hoped to obtain when they published the rates under review here.

The plaintiffs recognize that they cannot merely dismiss their action in view of the intervenors' counterclaim and, therefore, they have alleged that the counterclaim is improperly before this Court. The only question which really must be decided at this time in view of the Court's determination that the plaintiffs' motion to discharge or modify the bond is premature is whether the defendant intervenors have alleged a proper counterclaim.

The counterclaim asserted by the intervenors in this case appears to be a compulsory counterclaim as defined in Rule 13(a), Federal Rules of Civil Procedure, 28 U.S.C.A. That section states:

> "(a) Compulsory Counterclaims. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any op-

posing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim * * *."

The test most often relied upon for determining whether a counterclaim is compulsory or permissive is whether "there is any logical relation between the plaintiff's claim and the counterclaim." *1A Barron & Holtzoff, Federal Practice and Procedure,* Section 394, p. 573. That treatise also described the above test as "the one compelling test of compulsoriness." Therefore, if the intervenors' counterclaim against the plaintiffs is logically related to the plaintiffs' claim against the defendants and the intervenors, then it is a compulsory counterclaim.

In this action, the intervenors' counterclaim is directly related to the plaintiffs' complaint since as a part thereof the plaintiffs sought and obtained a Temporary Restraining Order from this Court. Between the time the Interstate Commerce Commission had ordered the rates cancelled and September 29, 1965, when the Temporary Restraining Order was dissolved, the higher rates which the Interstate Commerce Commission found had not been shown to be "just and reasonable" were in effect. This resulted in higher rates for the shippers than they would have had to pay had this Court not issued its Temporary Restraining Order. Therefore, it is evident that any damage suffered by the shippers was a result of the Temporary Restraining Order which in turn was an element of the relief sought from this Court by the plaintiff carriers and which in part was granted. For that reason, this Court concludes that the counterclaim of the intervenors is a compulsory one which can be asserted in this action.

In *Natural Gas Pipeline Co. of America* v. *Federal Power Commission,* 128 F.2d 481 (7 Cir. 1942), the Court

of Appeals, in reviewing a gas rate order of the Federal Power Commission, held that the court had ancillary jurisdiction based upon its equitable duty and thereupon ordered the refund and distribution of gas rates in excess of those lawfully applicable during the period of restraint ordered by the court. The court reasoned, p. 484,

> "Having original jurisdiction, what is the nature of and the true limitation upon that jurisdiction? Is its exercise discretionary upon the part of this court or are we confronted with a duty? In considering this, we should remember the distinction between ancillary or incidental jurisdiction and that which is original. Where a court has jurisdiction of a cause of action and the parties, it has jurisdiction also of supplemental proceedings which are a continuation of or incidental to and ancillary to the former suit even though the court as a federal tribunal might not have had jurisdiction of the parties involved in the ancillary proceeding if it were an original action."

In the present case, the facts are uncontroverted that the alleged injury suffered by the intervenors occurred as a direct result of the process of this Court which the plaintiffs sought and obtained. For this reason, the counterclaim asserted by the intervenors can and should be disposed of following the three-judge Court's determination of the merits involved in the Interstate Commerce Commission order. If, in fact, the three-judge Court finds that the Interstate Commerce Commission order was not supported by substantial evidence, then the intervenors would not be in a position to proceed with their counterclaim. On the other hand, if the Commission's order is finally affirmed, this Court would then be in a position to examine

and determine the rights of the intervenors under the bond involved herein. For purposes of the present proceeding, however, the Court finds that the counterclaim is a proper one and, therefore, the motion of the plaintiffs to dismiss it is denied. It is so ordered. Similarly, as previously indicated, this Court finds that the plaintiffs' motion to discharge or modify the bond is premature at this time and denies the motion without prejudice to the plaintiffs' right to raise it again following a three-judge Court's determination of the merits of the Interstate Commerce Commission's order. It is so ordered. Exceptions are allowed.

The three-judge Court will be convened on March 1, 1967, at ten o'clock A.M., to determine the remaining issue or issues pending before it.

Dated this 2nd day of February, 1967.

BY THE COURT:

GUNNAR H. NORDBYE
Judge

## APPENDIX E

### Order of September 29, 1965

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA
FOURTH DIVISION

4-65 Civ. 285

---

Middlewest Motor Freight Bureau, et al., Plaintiffs, vs. United States of America and Interstate Commerce Commission, Defendants, and The National Small Shipments Traffic Conference, Inc., et al., Intervenors, and Wisconsin Manufacturers Association, Intervenors.

---

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON APPLICATION FOR TEMPORARY INJUNCTION

This cause came on for hearing before this three-judge Court on September 24, 1965, upon motion by plaintiffs for an interlocutory injunction. Plaintiffs appeared by Harold C. Evarts, Esq., George D. Michalson, Esq., and Roland Rice, Esq. Defendants appeared by Sidney P. Abramson and Neil F. Convery, Assistant United States Attorneys for the District of Minnesota. The Interstate Commerce Commission appeared by Robert S. Grisvold, Esq. Intervenors Wisconsin Manufacturers Association appeared by Philip H. Porter, Esq. All other intervenors appeared by John J. C. Martin, Esq., Larry R. Henneman, Esq., and Michael P. Sullivan, Esq.

The Court having heard the arguments of counsel, having considered the affidavits submitted, on all the files, records and proceedings herein makes the following Findings of Fact and Conclusions of Law:

## Findings of Fact

### I

This is a proceeding to review the determination of the Interstate Commerce Commission (hereinafter referred to as "The Commission") in the proceeding designated as I and S Docket M-17450, *LTL Class Rates & Minimum Charges Between Midwest and Central Territories*, wherein the Commission determined that certain schedules for increases in less-than-truckload class rates and minimum charges filed with the Commission were "not shown to be just and reasonable." Those schedules established increased rates and charges on class-rated, less-than-truckload shipments between, to, and from points in Colorado, Illinois, Indiana, Iowa, Kansas, Kentucky, Michigan, Minnesota, Missouri, Nebraska, New York, North Dakota, Ohio, Pennsylvania, South Dakota, West Virginia, Wisconsin, and Wyoming. By stipulation of the parties concerned, the Commission's order also embraces such rates and charges on shipments moving between Iowa, Michigan, Minnesota, Nebraska, North Dakota, South Dakota, and Wisconsin on the one hand, and Arkansas, Louisiana, Mississippi, New Mexico, Oklahoma, Tennessee, and Texas on the other hand. Such schedules became effective on July 1, 1963. By Order of the Commission, Board of Suspension dated June 26, 1963, such schedules were suspended. By Order of the Commission dated August 8, 1963,

the said order dated June 26, 1963, was vacated and set aside as of September 7, 1963. By report and order dated February 24, 1965, the Commission ordered the scheduled increases to be cancelled finding "that the proposed increases are not shown to be just and reasonable." By subsequent order, the Commission postponed the date for compliance with the report and order of February 24, 1965, to September 13, 1965.

II

The Middlewest Motor Freight Bureau is a corporation organized under the laws of the State of Missouri and is a trade association and tariff publishing agent for some 1,300 motor common carrier members including the motor carrier plaintiffs herein.

III

On September 9, 1965, the United States District Court for the District of Minnesota made its temporary restraining order restraining and enjoining the Interstate Commerce Commission from enforcing its said order of February 24, 1965, and thereafter entered its subsequent orders, and suspending the operation of said order of February 24, 1965. On September 10, 1965, after notice, hearing on September 10 and 11, 1965, said Court made its order extending said temporary restraining order pending its determination of plaintiffs' motion for interlocutory injunction.

IV

On September 24, 1965, the three-judge Court heard and considered the arguments of counsel relative to plaintiffs' motion for an interlocutory injunction.

V.

Plaintiffs contend that the report and order of the Commission dated February 24, 1967, is unlawful on various grounds, such as being unsupported by the evidence, arbitrary, capricious, and an abuse of discretion, and that the Commission's findings represented an ex post facto application of revised standards as to the nature of the evidence required to justify the rate increases, but the plaintiffs primarily urge that their showing before the Commission justified a finding that, without the proposed increase, the operating ratio of many, if not most, of the carriers involved, would exceed 93 per cent, which the Commission had theretofore found to be reasonable.

VI

The Commission found that the evidence before it submitted by the carrier plaintiffs was of little probative value to support the proposed operating rates submitted to it, and on the hearing before this Court on the motion for an interlocutory injunction, this Court finds that the plaintiffs have failed to establish by any persuasive showing that the Commission had done anything more in applying its new standards to the record submitted, than to scrutinize with greater care the surveys which the carriers had presented in support of the proposed increased rates.

VII

This Court further finds on the showing before it

(a) That plaintiffs had reasonable notice of the alleged new standards which the Commission allegedly promulgated and which pertained to the degree

of proof necessary to sustain the surveys made by the carriers in support of the proposed increase of rates.

(b) That plaintiff carriers involved herein have adequate administrative remedies which will enable them to proceed with proposed new increased rates already filed with the Commission, or to proceed by timely filing with the Commission new proposed increase of rates.

(c) That the balancing of the equities in considering the magnitude of the losses and injury to the public if the interlocutory injunction as granted and if the Commission's order is sustained by the Court, as compared with the losses to the carriers if the injunction is not granted, with the remote possibility of the Commission's order being set aside, adequately justifies this Court, on this showing, in denying the motion for an interlocutory injunction.

(d) That plaintiffs have failed to convincingly demonstrate that there is any basis for concluding that there is a reasonable probability that this Court will overrule the Commission's order in its finding that the proposed rate increases are not shown to be just and reasonable.

## Conclusions of Law

1.

The plaintiffs are not entitled to an interlocutory injunction, and plaintiffs' motion therefor should be and hereby is denied.

2.

The temporary restraining order herein dated September 9, 1965, as extended by order dated September 20, 1965, should be and hereby is dissolved.

Dated this 29 day of September, 1965.

Harry A. Blackmun

Harry A. Blackmun
*United States Circuit Judge*

Edward J. Devitt

Edward J. Devitt
*United States District Judge*

Gunnar H. Nordbye

Gunnar H. Nordbye
*United States District Judge*

LIBRARY
REME COURT, U. S.

Office-Supreme Court, U.S.
FILED
SEP 29 1969
JOHN F. DAVIS, CLERK

No. 539

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1969

THE NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC., ET AL., *Appellants*,

v.

MIDDLEWEST MOTOR FREIGHT BUREAU, ET AL., *Appellees*.

**On Appeal From the United States District Court for the District of Minnesota, Fourth Division**

## MOTION TO DISMISS AND/OR AFFIRM

HAROLD C. EVARTS
1200 First National Bank Building
Minneapolis, Minnesota 55402

GEORGE D. MICHAELSON
P.O. Drawer 647
Kansas City, Missouri 64141

ROLAND RICE
1111 E Street, Northwest
Washington, D.C. 20004

*Attorneys for Appellees*

*Of Counsel:*

BEST, FLANAGAN, LEWIS, SIMONET & BELLOWS
1200 First National Bank Building
Minneapolis, Minnesota 55402

RICE, CARPENTER AND CARRAWAY
1111 E Street, Northwest
Washington, D.C. 20004

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

## INDEX


| | Page |
|---|---|
| Motion to Dismiss and/or Affirm | 1 |
| Statement of the Case | 2 |
| Argument | 10 |
| The Court Lacks Jurisdiction To Consider the Appeal | 10 |
| The Question Is Unsubstantial | 13 |
| Conclusion | 18 |


### TABLE OF CASES CITED


| | |
|---|---|
| Darnell, Inc. v. Illinois Central R. R. Co., 225 U.S. 243 (1912) | 12 |
| National Small Shipments Traffic Conference, Inc. v. Ringsby Truck Lines, Inc., 389 U.S. 909 (1967), 389 U.S. 576 (1968) | 17 |
| Public Service Commission v. Brashear Freight Lines, 306 U.S. 204 (1939) | 10 |
| Public Service Commission v. Brashear Freight Lines, 312 U.S. 621 (1941) | 12 |
| Robinson v. Baltimore & O. R. Co., 222 U.S. 506 (1912) | 12 |
| Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co., 204 U.S. 426 (1907) | 11 |
| T.I.M.E., Inc. v. U.S., 359 U.S. 465 (1959) | 8 |
| United States v. Alaska S.S. Co., 253 U.S. 113 (1920) | 7 |


### STATUTES INVOLVED


| | |
|---|---|
| 28 U.S.C. 1253 | 10 |
| 28 U.S.C. 2321, *et seq* | 3 |
| 49 U.S.C. 304a (2, 5) | 8 |
| 49 U.S.C. 316 | 15 |
| 49 U.S.C. 317(g) | 3 |

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1969

No. 539

THE NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC., ET AL., *Appellants*,

v.

MIDDLEWEST MOTOR FREIGHT BUREAU, ET AL., *Appellees*.

On Appeal From the United States District Court for the District of Minnesota, Fourth Division

## MOTION TO DISMISS AND/OR AFFIRM

Appellees, the motor common carrier plaintiffs below (J.S. 2a) respectfully move, pursuant to Rule 16(1)(a) and (e) of the Revised Rules of this Court, that:

(1) The appeal be dismissed on the ground that this Court lacks jurisdiction, or, in the alternative, that

(2) The judgment of the court below be affirmed on the ground that it is manifest that the question upon which the cause depends does not warrant the plenary consideration of this Court.

## STATEMENT OF THE CASE

Appellees respectfully submit that the following is an accurate statement of the question presented:

Will this Court entertain on direct appeal a final order and judgment dismissing without prejudice, on complainant's motion, a complaint wherein judicial review was sought of an order of the Interstate Commerce Commission, but where, through successful interposition of intervenors (appellants here) the injunctive restraint necessary to reach hearing on the merits was denied?

The order of the Interstate Commerce Commission under attack in these proceedings, entitled *LTL Class Rates and Minimum Charges Between Midwest and Central Territories*, I. & S. Docket M-17450, 325 I.C.C. 106 (1965), had its origin in tariff schedules published and filed with that Commission to become effective July 1, 1963. By these schedules appellee carriers initiated new and increased minimum charges and less-than-truckload class rates. Following protests filed by various traffic and/or trade associations and individual shippers, certain of the former being appellants here, the proposed schedules were suspended. Thereafter, by order of Division 2 of the Commission, the suspension was vacated, an investigation was ordered, and the new rates and charges were allowed to become effective on September 7, 1963.

Following hearing, and briefs filed in December, 1963, the Commission in its Report and Order dated February 24, 1965, found:

> "that the proposed increases are not shown to be just and reasonable." (325 I.C.C. at 122)

The Order further provided:

> "*It is ordered,* That the respondents herein be, and they are hereby, notified and required to cancel on or before April 14, 1965, the schedules described in the order entered on June 26, 1963, by the Commission's Board of Suspension upon not less than one day's notice to the Commission and to the general public by filing and posting in the manner prescribed by the Commission under Section 217 of the Interstate Commerce Act, and that this proceeding, be, and it is hereby, discontinued." (325 I.C.C. at 123)

Through subsequent administrative proceedings before the Commission, not pertinent here, the effective date of compliance with the provisions of the above order was postponed until September 13, 1965, at which time the administrative proceedings became final.

At that time, had the carriers elected to comply with the Commission order, cancel the rates, and forego judicial review, they were free to effectuate by publication new rates and charges at any level which their judgment indicated could be justified before the Commission. This level of rates would be initiated by the carriers upon their filing and posting new tariff schedules in the manner prescribed by the Commission under the authority of 49 U.S.C. 317(g).

Instead of canceling, and filing a different level of rates, the carriers sought judicial review of the Commission order and brought these proceedings in the court below under the statute, 28 U.S.C. 2321, *et seq.*, seeking to avoid the required cancellation on the grounds that (1) the order of cancellation was invalid because the Commission had retroactively applied new standards with which to appraise the evidence, and

(2) the Commission refused to grant a rehearing to permit further proof as to the validity of the rates at issue through the introduction of new evidence by the carriers meeting these new standards of proof articulated by the Commission in other proceedings after the close of hearing in this case.

A temporary restraining order was issued on September 9, 1965, ultimately conditioned upon the filing by appellees of an injunction bond, or bonds, providing, at appellants' request, for payment of "all sums paid in excess of rates or charges which would have been applicable on September 13, 1965, and thereafter, in compliance with the Interstate Commerce Commission's said order, . . ." provided the order of the Interstate Commerce Commission "shall be finally affirmed."

Appellees' motion for an interlocutory injunction was successfully opposed by appellants, and on September 29, 1965, the three-judge court entered its order dissolving the temporary restraining order and denying appellees' motion for an interlocutory injunction. (J.S., App. E)

This order, as already noted, forced the appellee carriers to seek from the Interstate Commerce Commission additional time in which to cancel the rates then at issue and to effectuate by publication on one day's notice a new schedule as a substitute for the old. The Commission by order of September 30, 1965, granted the carriers additional time, to October 11, 1965, within which to comply with its previous order. (See J.S., App. B, 6a, 7a.) On this latter date, the newly "authorized" schedule was published, filed and became effective. By these events the mootness later

found by the court to exist, had been brought about. (J.S., App. B, 8a)

The Commission order of September 30, 1965, is markedly different from that of February 24, 1965, as is immediately apparent from the excerpts of the ordering provisions in each when placed side by side:

| *Order of February 24, 1965* | *Order of September 30, 1965* |
|---|---|
| The carriers are "required to *cancel* . . . the schedules described in the order entered on June 26, 1963 . . . ." (325 I.C.C. at 123) | The carriers are "authorized to *reestablish such rates as were in effect prior to* the issuance of the suspension order in this proceeding . . . ." (J.S., App. B, 7a) |

(Emphasis added)

Dissolution of the temporary restraining order and denial of an interlocutory injunction prevented appellees from being heard on the merits of their cause prior to cancellation of the rates. With cancellation of the old rates, and publication of the new rates authorized in the September 30, 1965, order, the court below could not, and could not now, upon remand, afford any of the relief sought by appellees in their complaint.

Perceiving that matters affecting the counterclaims and injunction bonds were appropriate for disposition by a single judge, appellees, after the interlocutory injunction was denied, moved to dismiss the counterclaims and discharge the bonds. After hearing, an interim order was entered on February 2, 1967, (J.S. App. B), wherein a single judge, Nordbye, J., concluded that "the counterclaim of the intervener is a compulsory one which can be asserted in this action," (J.S. 21a) and that it "can and should be disposed of following the three-judge Court's determination of the merits involved in the Interstate Commerce Commis-

sion order." (J.S. 22a) That order also held that the appellees' motion to discharge or modify the bonds was "premature at this time," and denied the motion without prejudice to its being raised following a determination on the merits as to the lawfulness of the Commission order. (J.S. 23a)

Thereafter, motions were brought by the appellees which resulted in the order of September 5, 1968, (J.S. App. B), as modified by the order of April 9, 1969. (J.S. App. C) From the effect of these two orders, appellants now appeal.

Candor requires careful examination of those orders and an analysis of their effects, in order to place in proper perspective certain statements contained in the Jurisdictional Statement beginning at page 4. Contrary to the assertion of appellants (J.S. 4) the consequences of the district court's action are markedly different than if it had overruled and set aside the Commission's determination. Examination of those orders will follow to ascertain accurately the impact of that action.

In its first order, the three-judge court correctly observed that because appellees had obtained adequate rate relief from the Commission they were no longer interested in seeking the equitable relief initially sought by restraint of the February 24, 1965, Commission order. The court said:

> "Obviously, in light of the record, the issues between plaintiffs and the Interstate Commerce Commission and the United States have become moot, and a dismissal should be granted unless the intervention of the intervenors with their counterclaims requires a finding of this court as to the

merits of plaintiffs' action against the Commission as a condition precedent to the enforcement of said counterclaims." (J.S. 8a)

The court reasoned that if upon the admitted facts appellants had no enforceable claims against the carriers or their surety, no purpose would be served in passing upon the merits of the complaint ". . . in that these entire proceedings would then be moot and plaintiffs' motion should be granted."[1] (J.S. 8a)

In the view of the court, the Commission order of September 30, 1965, was made in the face of then apparent economic facts which had existed over a period of some two years since the challenged rates were first initiated. In the court's opinion, Commission authorization of the continued collection of the challenged rates of October 11, 1965, and its grant of higher rates effective November 16, 1965, exceeding even the revenue afforded by the challenged rates, indicated to the court that the temporary restraining order of the district court did not inflict any damages upon the intervenor-appellants. (J.S. 9a)

The court could, therefore, not make a determination that the carriers should have charged the pre-September 7, 1963, rates during the period of the temporary restraint when the Commission had thereafter, with its superior expertise, permitted the carriers to charge the challenged rates beyond the period of restraint. This indicated to the court that the grant of its temporary injunction inflicted no damage upon the shippers rate-wise. The court recognized that the Com-

[1] The correctness of this conclusion suggests mootness of this appeal and would support its dismissal by this Court. *United States* v. *Alaska S.S. Co.*, 253 U.S. 113 (1920).

mission, in its superior expertise, had exclusive jurisdiction to determine the legal rates during the period of restraint.[2]

The possibly "inappropriate"[3] use of the term "*nunc pro tunc*" as descriptive of the September 30, 1965, Commission order in the first of the three-judge court orders, impelled appellants to seek the rehearing which led to the final order of April 9, 1969. (J.S. App. C) In that order the court below, without reliance upon a "*nunc pro tunc*" effect of the Commission's order of September 30, 1965, reaffirmed its earlier order.

The statutory consequence of the entire scheme of rate regulation prescribed by Congress led the court to conclude that it would be inequitable to require restitution to the shippers for the period of the temporary restraint, when the Commission, by its order of September 30, 1965, intended to allow the continued collection of the published rates from September 30, 1965, to October 11, 1965, and allowed even higher rates thereafter, effective November 16, 1965.

As the three-judge court said:

> ". . . The carriers therefore continued to charge their published rates from September 13, 1965, to September 30, 1965, and it must be recognized

---

[2] This Court in *T.I.M.E., Incorporated* v. *U.S.*, 359 U.S. 465 (1959), recognized that motor carriers could make no refund in published freight charges; subsequently Congress provided a legal remedy for the collection of unlawful charges through enactment of Public Law 89-179, effective September 6, 1965, covering the time period at issue (49 U.S.C. § 304a(2) (5), 79 Stat. 651), but appellants have not sought to perfect their claims under this statute.

[3] Acknowledged by the court below, J.S. App. C., 15a.

> that these rates never have been pronounced unlawful by the Commission. It is our view, therefore, that notwithstanding the Commission's interpretation of its order of September 30, 1965, it does not follow from the entire record herein that these challenged rates were unjust and unreasonable during the period from September 13 to September 30, 1965, so as to justify the relief which the intervenors request." (J.S. 15a-16a)

The court added:

> ". . . The restraining order, therefore, issued by this court, in light of the history of these proceedings, should be recognized as a continuance of the legally published rates and as effecting the same purposes and equities which the Commission achieved in its order of September 30, 1965. We conclude and find, therefore, that the rates charged by the carriers from September 13 to September 30, 1965, in light of the entire record and attendant circumstances, should not be considered as unjust and unreasonable by this court." (J.S. 16a)

The court thereupon affiirmed its prior dismissal of the complaint without prejudice, dismissal of appellant's counterclaims and discharge of the bonds. From such orders this appeal is taken.[4]

---

[4] A similar appeal to this Court was taken by the United States Government, *qua* shipper, but was voluntarily dismissed by it. Concurrent appeals have been filed in the United States Court of Appeals for the Eighth Circuit by appellants here, and by the Government, *qua* shipper, from the orders below.

## ARGUMENT

### The Court Lacks Jurisdiction To Consider the Appeal

The fatal defect in appellants' position appears at page 11 of the Jurisdictional Statement, wherein, after characterizing the action of the three-judge court, appellants stated:

> ". . . If this is denial of an injunction which had been sought by the carrier-appellees, then appellants have no standing to invoke this court's jurisdiction. If this is the granting of an injunction, appellants have standing and this Court has jurisdiction."

Thereafter, appellants correctly stated that:

> "If the order below is neither the grant nor the denial of an injunction, the words of the Judicial Code appear to foreclose this Court's jurisdiction on appeal." (J.S. 11)

Appellees believe it eminently clear that the order below is "neither the grant nor the denial of an injunction" within the language and meaning of the Code (28 U.S.C. 1253).[5] Thus direct appeal is foreclosed.

The lack of jurisdiction here asserted by appellees is consistent with both their position respecting the effect of the decision below, and their interpretation of the decision of this Court in *Public Service Commission* v. *Brashear Freight Lines*, 306 U.S. 204 (1939).

---

[5] Appellants evidently so concede, for in their application to this Court dated August 7, 1969, for extension of time within which to docket this appeal and to file their Jurisdictional Statement, they say, at page 2, "The judgment of the District Court on April 9, 1969, . . . neither granted injunctive relief nor denied it."

As to the first of the foregoing—appellees' position respecting the decision below—the crux of appellants' error in claiming that this Court has jurisdiction is found in their view (J.S. 13) that ". . . the counterclaim could not be dismissed below without a finding that the rates were just and reasonable . . ." This interpretation of the lower court's order is preceded by repeated contentions that the court *did* find that the rates *were* just and reasonable. (J.S. 8, 9, 13 and footnote, p. 13)

It is unmistakable that the court below made no such finding, but clearly stated:

> ". . . We conclude and find, therefore, that the rates charged by the carriers from September 13 to September 30, 1965, in light of the entire record and attendant circumstances, should not be considered as unjust and unreasonable by this court." (J.S. App. C 16a)

Accordingly, the court found that equity would not be served by an award of restitutional damages for it could find no damage. Obviously, the question there decided does not provide a basis for direct appeal under the Code.

Nor is this all. The court's recognition that ". . . these rates have never been pronounced unlawful by the Commission" (J.S. App. C 15a) is even more fundamental to the issue here and further demonstrates appellants' error. For while the appellants recognize the teachings of this Court in *Texas & Pacific Ry Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 462 (1907), as a bar to a judicial declaration that the carrier rates *were just and reasonable,* they fail to recognize that the converse holding, i.e., a finding that the rates were

unjust and unreasonable, rests similarly within the exclusive primary jurisdiction of the Commission. Without such a finding there can be no refund ordered by a court.[6]

As to their second position, appellees note that in the *Brashear* decision (306 U.S. 204), this Court dealt with an appeal from an order of a three-judge court dismissing a counterclaim. As to the right of appeal, the posture of appellant, successful below, was in all controlling respects similar to the posture of appellants here. This Court dismissed the appeal, noting that since appellant, the Public Service Commission, was a prevailing party below, it was not entitled to be heard on its direct appeal to this Court. Appellants here were the prevailing parties below, successfully resisting an interlocutory injunction, thus obtaining compliance with the Commission's cancellation order while also thwarting the carriers' efforts to have the Commission's decision set aside.

*Brashear* reached this Court a second time (312 U.S. 621 (1940)) after a *writ of certiorari* was granted to the court of appeals for the Eighth Circuit. The appeal there arose under a different statute than is involved here and the decision has no teaching for the instant situation.

The footnote at page 13 in the Jurisdictional Statement deserves special comment. Neither the Commission nor the district court found the rates to be "unjust and unreasonable." The Commission found

---

[6] Since *Abilene*, it has been consistently held by this Court that a prior Commission order is essential. See, e.g., *Robinson* v. *Baltimore & O. R. Co.*, 222 U.S. 506, 32 S. Ct. 114 (1912) and *Darnell, Inc.* v. *Illinois Central R.R. Co.*, 225 U.S. 243, 32 S. Ct. 760 (1912).

them not to be shown just and reasonable. The court found the rates "should not be considered as unjust and unreasonable . . ." (J.S. 16a) What both the Commission in its September 30, 1965, order and the court below held was that the rates maintained during temporary restraint (but without either an affirmance or vacation of the Commission order) were the lawfully published rates and the only rates to be collected legally until the carriers complied with the Commission order directing their cancellation. Although the carriers failed in discharging fully their statutory burden of proof before the Commission to establish that the 1963 schedules were just and reasonable, neither did appellants establish their assertions that the rates were unlawful in any respect, nor could or did the Commission, on the record before it, make such a finding.

The brief stay granted by the court below to enable it to hear and dispose of the carriers' motion for an interlocutory injunction did not prevent appellants from achieving the benefit of the Commission's order, i.e., the cancellation of the rates at issue. Moreover, it forced the carriers to shoulder again the burden of proving the lawfulness of their new rates. The complaint has been dismissed, and the order of the Commission is not subject to an order of a district court of three judges granting or denying an injunction. The Court should deny jurisdiction of the appeal.

**The Question Is Unsubstantial**

Appellants, ascribing meaning neither intended nor necessary to support the lower court's orders here attacked, interpret the orders of September 5, 1968, and April 9, 1969, as though they constitute an in-

trusion upon the exclusive primary jurisdiction of the Interstate Commerce Commission. They incorrectly assert that the trial court found the level of rates maintained during the period of restraint to be "just and reasonable." (J.S. 8, 9) The court actually concluded and found that the rates charged during that period "should not be considered as unjust and unreasonable by this court." (J.S. App. C, 16a) But findings by a court as to the reasonableness or unreasonableness, the lawfulness or unlawfulness, or the justness or the unjustness of these rates maintained during the temporary restraint are not essential to a resolution of the issues joined by the complaint and answer, or to the propriety of the lower court's dismissal of the proceedings.

The matters under the guise of this appeal which appellants truly seek to reach relate solely to the existence or nonexistence of the right to restitution, which right is being suitably protected by appeals docketed and pending in the court of appeals.

The lower court said, in its September 5, 1968, order, that:

> "... The undeniable fact is that these intervenors during the injunction period did not pay any freight charges to these carriers which exceeded the rate set by the Commission. The granting of the temporary injunction inflicted no damage to them rate-wise. *It is for the Commission to determine the legal rates during this period,* and this it did by its *nunc pro tunc* order of September 30, 1965." (J.S. 10a, emphasis supplied)

It was the possibly "inappropriate" use of the term "*nunc pro tunc*" that induced appellants to seek reconsideration by the three-judge court of its order of

September 5, 1968. (J.S. 7) The trial court in its April 9, 1969, order, excised the words "*nunc pro tunc*" now relied upon by appellants, and in clear, unmistakable language confirmed the position consistently espoused by appellees throughout these proceedings that the rates maintained during the period of restraint were the effectively pubished rates, and hence the lawful rates, so long as a Commission order directing their cancellation had not become effective and until the carriers had initiated and effectuated new rates. The court adopted the Commission view on this subject expressed in its Joint Statement of Position and said that:

> ". . . Under the statutory scheme, specifically Section 216, 49 U.S.C. § 316, carriers initiate and publish rates which remain in force so long as a Commission order requiring their cancellation has not become effective." (J.S. 14a);

and later, that same April 9, 1969, order said:

> ". . . The carriers therefore continued to charge their published rates from September 13, 1965, to September 30, 1965, and it must be recognized that *these rates never have been pronounced unlawful by the Commission.* It is our view, therefore, that notwithstanding the Commission's interpretation of its order of September 30, 1965, it does not follow from the entire record herein, that these challenged rates were unjust and unreasonable during the period from September 13 to September 30, 1965, so as to justify the relief which the intervenors request." (J.S. 15a-16a, emphasis supplied);

and still later, the three-judge court said:

> ". . . *The restraining order*, therefore, issued by this Court, in light of the history of these proceed-

> ings, *should be recognized as a continuance of the legally published rates* and as effecting the same purposes and equities which the Commission achieved in its Order of September 30, 1965." (J.S. 16a., emphasis supplied)

Since these recited conclusions of the three-judge court are consonant with the statutory scheme of rate regulation, and further, since that level of rates is significant only as to the money claims of appellants, it follows that the lawfulness of the rates maintained during the restraint, and their effect upon the alleged right to restitutional recovery, are matters beyond the perimeters of this Court's jurisdiction. Their specific lawfulness or unlawfulness was not decided by the court below, and has never been decided by the Commission.

The remaining matter, and the only one possibly within this Court's limited jurisdiction, is that relating to dismissal of the complaint. The matter that would be on review before this Court relates only to whether appellees should proceed to a hearing which can have no prospective effect on tariff schedules which they were required to cancel. Such hearing would concern itself only with (1) the application of standards of evidence to a record made before the Commission in 1963, (2) the substantiality of the evidence to support the Commission order entered in 1965, (3) the adequacy of notice as to the application of new standards so as to comply with procedural requirements of due process, and (4) whether appellees should have been afforded a new or further hearing in the light of the alleged application of new standards.

The complaint, then, asked only that the district court decide whether the Commission had applied ac-

cepted procedural and substantive principles of law to an evidentiary record to determine whether the Commission acted within the limits of its discretion. Subsequent to Commission action here, the Commission has articulated its new standards and procedures for guidance in future proceedings before it.

Even were this Court to conclude that the carriers had been entitled to interlocutory relief to afford a hearing to determine their substantive rights before being required to cancel their rates, the rates at issue cannot be revived. Nor could the carriers benefit by a judicial determination that an order of the Commission with which they had been required to comply had been unlawfully issued.

The carriers have long since complied with the Commission order, have canceled the rates at issue and have made effective by new publication, with Commission approval, a new level of higher rates and charges. Focusing thus on the real issue raised by this appeal, it becomes increasingly clear that the question on which the decision of this cause must ultimately depend, i.e., whether the then known standards of evidence and reasonableness were properly applied by the Commission, is so unsubstantial as not to warrant exercise of the plenary jurisdiction of this Court for further briefing and oral argument.

The survival of an issue between the carriers and the shippers involving only the validity of claims for restitution is not so substantial a question as to require a judicial determination of the merits of the original complaint when all issues between the plaintiffs and defendants have become moot. *National Small Shipments Traffic Conference, Inc., et al.* v. *Ringsby Truck Lines, Inc., et al.*, 389 U.S. 576 (1968), 389 U.S. 909 (1967).

## CONCLUSION

Appellees urge that the order of the court below be affirmed and that the appeal be denied for want of jurisdiction, or, alternatively, that it be dismissed for want of presenting a substantial question.

Respectfully submitted,

HAROLD C. EVARTS
1200 First National Bank Building
Minneapolis, Minnesota 55402

GEORGE D. MICHALSON
P.O. Drawer 647
Kansas City, Missouri 64141

ROLAND RICE
1111 E Street, Northwest
Washington, D.C. 20004

*Attorneys for Appellees*

*Of Counsel:*

BEST, FLANAGAN, LEWIS,
SIMONET & BELLOWS
1200 First National
Bank Building
Minneapolis, Minnesota
55402

RICE, CARPENTER AND
CARRAWAY
1111 E Street, Northwest
Washington, D.C. 20004

SUPREME COURT, U. S.
FILED
OCT 6 1969
JOHN F. DAVIS, CLERK

No. 539

# In the Supreme Court of the United States

OCTOBER TERM, 1969

THE NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC., ET AL., APPELLANTS

*v.*

MIDDLEWEST MOTOR FREIGHT BUREAU, ET AL.

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA*

## MOTION TO DISMISS

ERWIN N. GRISWOLD,
*Solicitor General,*
*Department of Justice,*
*Washington, D.C. 20530.*

FRITZ R. KAHN,
*Acting General Counsel,*
*Interstate Commerce Commission,*
*Washington, D.C. 20423.*

# In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 539

THE NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC., ET AL., APPELLANTS

*v.*

MIDDLEWEST MOTOR FREIGHT BUREAU, ET AL.

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA*

## MOTION TO DISMISS

Pursuant to Rule 16(1)(a) of the Rules of this Court, the United States and the Interstate Commerce Commission move that the appeal be dismissed for lack of jurisdiction.

This is a direct appeal by various shipper organizations and state regulatory bodies who were defendant-intervenors in a suit by motor carrier interests seeking to enjoin enforcement of an Interstate Commerce Commission order compelling the cancellation of certain increased rates. The district court dismissed the case as moot, without prejudice; simultaneously dismissed monetary counterclaims of the intervenors

(including the United States as shipper); and discharged security bonds filed by carriers as a condition for the earlier grant of a temporary restraining order.[1]

The jurisdiction of this Court is invoked under 28 U.S.C. 1253. We submit that this Court lacks jurisdiction over the direct appeal and that in the circumstances of this case an appeal from the district court's decision properly lies to the Court of Appeals for the Eighth Circuit under 28 U.S.C. 1291. This appeal should therefore be dismissed.

## STATEMENT

In 1963, certain motor carriers, members of appellee Middlewest Motor Freight Bureau, filed schedules with the Interstate Commerce Commission for increased rates, which were permitted to become effective in September 1963. Subsequently, after appropriate administrative proceedings, the Commission, by a report and order dated February 24, 1965 (*I. & S. Docket No. M-17450, LTL Class Rates & Minimum Charges Between Midwest and Central Territories*, 325 I.C.C. 106), found that the rate increases had not been shown to be just and reasonable and ordered them cancelled by September 13, 1965.

On September 9, 1965, the carriers filed this suit to enjoin enforcement of the Commission's order. A temporary restraining order was issued upon the posting by plaintiffs of a bond to compensate any party for damages wrongfully incurred as a result

[1] J.S. App. B, as modified by the court's decision denying motions for amended findings of fact, conclusions of law and order for judgment, or for a new trial, J.S. App. C.

of the temporary restraining order. Appellants supported the Commission and filed counterclaims for restitution of the higher rates paid while the restraining order was in effect.[2] On September 29, 1965, a three-judge court, after hearing, denied the carriers' motion for an interlocutory injunction and dissolved the temporary restraining order (J.S. App. E). The carriers then obtained from the Commission an order postponing until October 11, 1965, the date for complying with the Commission's cancellation order (J.S. App. 6a–7a), in order to afford them a reasonable time within which to publish the appropriate tariffs. Subsequently, the carriers filed higher rates with the Commission which became effective on November 16, 1965. After the Commission found on a new record that the November 16, 1965, rates were just and reasonable, the carriers successfully moved the district court to dismiss this suit as moot, to dismiss the shippers' counterclaims for restitution for the higher rates they paid as a result of the temporary restraining order and to discharge the bonds. The shippers and the United States as shipper filed appeals to this Court and to the Court of Appeals for the Eighth Circuit. The United States has since withdrawn its appeal to this Court.

## ARGUMENT

Under 28 U.S.C. 1253 this Court has jurisdiction over any appeal from an order granting or denying an injunction in a civil suit required by statute to be heard and determined by a three-judge district court. Under 28 U.S.C. 2325 an "injunction restraining the

[2] The United States subsequently filed its counterclaim as shipper in 1967.

enforcement, operation or execution, in whole or in part" of a Commission order "shall not be granted unless the application therefor is heard and determined by a district court of three judges * * *." Because the carriers' first rate increase was superseded by the second (November 16, 1965) rate increase, the question presented by the complaint—whether the court should enjoin the Commission's February 24, 1965, order requiring cancellation of the first rate increase—became moot. That order could no longer be "enforced" by the Commission and there was thus no order before the three-judge court as to which it could grant injunctive relief.

The remaining ancillary issues—the shippers' counterclaims for restitution and the appropriate disposition of the carriers' bond—should have been determined by a single district judge. See *Public Service Commission* v. *Brashear Freight Lines, Inc.*, 312 U.S. 621, and 306 U.S. 204. Such a procedure for the determination of what had become essentially an action for restitution by the shippers, with an appeal to the court of appeals, would be in keeping with the policy expressed by this Court "of limiting the three-judge court procedure within its expressly stated confines." *United States* v. *Interstate Commerce Commission*, 337 U.S. 426, 443. But the fact that three judges rather than one did consider the question raises no serious problem. In such a situation, the decision is properly treated as if it were the decision of a single judge and thus is reviewable in and only in the court of appeals. *Public Service Commission* v. *Brashear Freight Lines, Inc.*, *supra*, 312 U.S. at 626.

Appellants' characterization of the district court's decision as "a partial grant of the injunction which appellees [the carriers] sought below * * *" (J.S. 13) is untenable. The court's ruling on the shippers' counterclaims, rather than its dismissal of the carriers' complaint, is plainly the issue upon which the appeal is based. And although a single district judge disposing of the shippers' claims for restitution might have been required to rule on the validity of the Commission's finding that the first rate increase had not been shown to be just and reasonable, such a ruling would be merely declaratory in nature and would in no sense amount to an "injunction" for purposes of 28 U.S.C. 2325.

Had the court below ruled in appellants' favor on the restitution issue the carriers, plaintiffs below, having themselves sought and obtained dismissal of the complaint praying for an injunction, could plainly have appealed that ruling only to the court of appeals. Jurisdiction over the appeal from the ruling on the restitution issue should not depend on the result reached by the district court on the merits of that issue. In the absence of an order granting or denying an injunction which would be appealable to this Court under Section 1253, appeal should in both instances be to the court of appeals.

## CONCLUSION

The appeal to this Court should be dismissed for lack of jurisdiction.

Respectfully submitted.

ERWIN N. GRISWOLD,
*Solicitor General.*

FRITZ KAHN,
*Acting General Counsel,*
*Interstate Commerce Commission.*

OCTOBER 1969.

SUPREME COURT, U. S.

No. 539

FILED
OCT 21 1969
JOHN F. DAVIS, CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1969

THE NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC., *et al.*,

*Appellants,*

*v.*

MIDDLEWEST MOTOR FREIGHT BUREAU, *et al.*,

*Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA, FOURTH DIVISION

## APPELLANTS' BRIEF IN OPPOSITION TO MOTIONS TO DISMISS OR AFFIRM

ARTHUR A. ARSHAM
233 Broadway
New York, N. Y. 10007

JOHN J. C. MARTIN
685 Third Avenue
New York, N. Y. 10017

RICHARD A. BOWMAN
300 Roanoke Building
Minneapolis, Minnesota 55402

*Attorneys for Appellants*

*Of Counsel:*

ARSHAM & KEENAN
233 Broadway
New York, N. Y. 10007

CANT, HAVERSTOCK, GRAY, PLANT & MOOTY
300 Roanoke Building
Minneapolis, Minnesota 55402

# INDEX


| | Page |
|---|---|
| I. The Basis For This Appeal | 1 |
| II. The Government's Motion to Dismiss | 5 |
| III. Appellees' Motion to Dismiss and or Affirm | 10 |
| Conclusion | 16 |


## Table of Cases Cited


Accelerated "Expressport" Pony Express v. United States, 227 F. Supp. 516, aff'd per curiam, 379 U. S. 4 (1963) ..... 8, 11

Atlantic Coast Line v. Florida ..... 14

Baltimore & O. R. Co. v. United States, 279 U. S. 781 ..... 14

Bell v. United States, 48 F. Supp. 305 (1943) ..... 4

Brimstone R. & C. Co. v. U. S., 276 U. S. 104 ..... 3

Consolidated Freightways v. United States, (W. D. Washington, N. D. No. 6001) ..... 11

Erie R. R. Co. v. Alabama & V. Ry. Co., 175 I. C. C. 365 ..... 4

Inland Steel v. United States, 306 U. S. 153 (1939) ..... 3

National Small Shipments Traffic Conference v. Ringsby Truck Lines, 280 I. C. C. 528 ..... 12, 13

Pacific States Conference v. Brooklyn Freight Lines, 312 I. C. C. 621 (1960) ..... 8, 9, 11

Southern P. Co. v. I. C. C., 236 U. S. 439 ..... 13

PAGE

Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co., 204 U. S. 462 (1907) ..... 13

T.I.M.E. Inc. v. United States, 359 U. S. 464 ..... 14

United States v. Alaska S.S. Co., 253 U. S. 113 ..... 12

United States v. Baltimore & O. R. Co., 284 U. S. 195 ..... 4

United States v. I.C.C., 337 U. S. 426 ..... 5

In the

# Supreme Court of the United States

October Term, 1969

---

The National Small Shipments Traffic Conference, Inc., *et al.*,

*Appellants,*

*v.*

Midwest Motor Freight Bureau, *et al.*,

*Appellees.*

---

On Appeal from the United States District Court for the District of Minnesota, Fourth Division

---

## APPELLANTS' BRIEF IN OPPOSITION TO MOTIONS TO DISMISS OR AFFIRM

A motion to dismiss has been filed by government parties (United States and Interstate Commerce Commission) solely on jurisdictional grounds. A motion to dismiss and or affirm has been filed by the carrier-appellees on grounds of jurisdiction and substantiality. This response is directed to both motions.

### 1. The Basis For This Appeal

An issue of utmost consequence in the regulation of carriers is in danger of being submerged by a morass of procedural detail. The tangle of procedural events can scarcely be said to have been unravelled by appellees' restatement of the question (p. 2, appellees' brief) or by

mission's order by declining to rule on the merits of the complaint so as to fix the carriers' liability for restitution and the injunction bond. The case was set for hearing on the merits on July 9, 1968. It was briefed, tried, and argued on the merits that day. A decision by the three-judge court affirming the Commission's order would have made way for subsequent resolution by a one-judge court, of issues raised by counterclaim respecting injunction bond and restitution. But a decision on the merits of the complaint, the three-judge court did not make. Instead, it undertook an adjudication of the counterclaim. The difficulty was not merely that the protocol established by *Bradley*[*] was thereby infringed. The underlying problem was that, while the court had before it a full record for adjudication of the complaint on the merits, *no record* had been made by the parties for adjudication of the counterclaim. Such data as the court had before it was so fragmentary and incomplete as to preclude findings of fact, to say nothing of an evaluation of equities necessary for definitive judgment of the merit of the counterclaim. This deficiency was the source of a profound misconception as to the purport of the Commission's order of postponement dated September 30, 1965, in light of certain rate increases effective November 16, 1965. These increases were viewed by the court as "approved" by the Commission (J.S. 16a). Hence, it concluded, the rate increases collected by the carriers from September 13 to September 30, 1965 (when the Commission's order of cancellation lay under court restraint) "should not be considered unjust and unreasonable by this court". In point of fact, the November 16th increases were *not approved* by the Commission. They were ordered investigated when published to determine whether they were just and reasonable. They were subsequently modified by the carriers

---

[*] Public Service Commission v. Brashear Freight Lines, 312 U. S. 621 (1940).

The modification was suspended and ordered investigated by Commission order. The proceedings were then consolidated for investigation and it was not until April 4, 1967, that the Commission issued an administratively final order discontinuing the investigation.

Events attending the November 16, 1965 increases repel the inference that they were "approved" by the Commission. Yet, it was from something as equivocal as the November 16th increases standing alone that the court formed the conclusion that the increases charged from September 13 to September 30, 1965, were "not unjust and unreasonable". This conclusion was reached in the face of: (1) a Commission order directing cancellation of these rates as not shown just and reasonable; (2) the Commission's explicit statement that by its postponement order of September 30, 1965, it did not approve or prescribe the higher rates from September 13th (J.S. 13a); (3) a formidable body of decisional authority precluding retroactivity such as would make it possible for an order entered September 30, 1965—by word or deed—to take effect from September 13, 1965.* The 1968 decision of the district court held the Commission's order of September 30th to be effective *nunc pro tunc* from September 13th. In its 1969 decision, it receded from *nunc pro tunc* language. But it continued to impart a retroactive effect to the Commission's order. This is articulated in the 1969 decision (J.S. 14a-15a):

> "Certainly, the Commission had authority to continue the challenged rates in effect from Septem

* United States v. Baltimore & O. R. Co., 284 U. S. 195, 203 (1931); Brimstone R. & C. Co. v. U. S., 276 U. S. 401, 122; Erie R.R. Co. v. Alabama & V. Ry. Co., 173 I.C.C. 563, 567; Bell v. United States, 49 F. Supp. 505 (1943).

> ber 13 to September 30, 1965, although the term 'nunc pro tunc' as used by this court in its order of September 5, 1968, may be inappropriate and may be stricken."

The view that the Commission had authority *by order issued September 30, 1965*, to continue the challenged rates in effect from September 13 to September 30, cannot coexist with the decisions cited above.

*Inland Steel* v. *United States*, 306 U. S. 153 (1939) speaks directly to these points. It deals with judicial review of agency action and specifically with enforcement of conditions imposed in granting injunctive relief. It passes on the effect of an I.C.C. order postponing the effective date of a Commission cease and desist order that was under court review. Finally, it is a decision of this Court which accepted on direct appeal from the district court an issue relating solely to equitable restitution. Appellants here do not seek adjudication of their claim for restitution but only that the court below perform the function for which it was convoked by deciding on the merits of appellees' complaint. As in *United States* v. *I.C.C.*, 337 U. S. 426, 466 (a direct appeal made to and accepted by this Court involving the issue of reparation), appellants here seek the relief there granted:

> "Since the district court did not pass on the merits of the allegations of the complaint, the cause is remanded to it for that purpose."

**2. The Government's Motion to Dismiss.**

The first barrier to jurisdiction set up by the government's brief is a syllogistic argument: as the Commission order that was enjoined concerned an increase later superseded by a second increase (November 16, 1965), the Commission's order could no longer be "enforced"; there

was nothing to enjoin; nothing from which to appeal. So woodenly literal an argument will not commend itself to this Court. One need not, however, explore the imperfections of its logic and rationale. A basic factual error condemns the argument. The error is found in the reference to the November 16th increase. The government states (p. 3):

> "After the Commission found on a new record that the November 16, 1965 rates were just and reasonable, the carriers successfully moved the district court to dismiss this suit as moot . . ."

At no time did the Commission find on a new record or on any record that the November 16, 1965 rates were just and reasonable. Nothing illustrates as vividly the mischief wrought by adjudication without a record as the error into which the government parties have strayed, presumably as a consequence of references in the opinions below to the November 16th increases. The facts are these:

The increases ordered cancelled by the Commission in the order that is the subject of this action were 5% in less-truckload rates and 30¢ in minimum charges. The rate action effectuated November 16, 1965 was an increase in per shipment charges of $1 and in minimum charges of $1. These increases were ordered investigated by the Commission. No hearing was ever held and that investigation eventuated in no findings as to the reasonableness of the increased per shipment charges. On May 1, 1966, the $1 per shipment increases were converted to rate increases. *These were suspended by the Commission* and investigation was consolidated with that previously ordered with respect to the November 16th increases.

the per shipment charges previously dealt wi
verted to class rates. The Commission susp
increases with respect to shipments weighing
pounds. On appeal, Division 2 of the Com
pended increases with respect to shipments
pounds. At a later date, the suspensions w
and ultimately (April 4, 1967) an administr
order discontinuing the investigation wit
Commission. At no time did the Commission
finding that the November 10, 1966 increas
and reasonably. Indeed those increases were
subsequent increases that were suspended
revenue must be exactly contrary to the "reas
able" characterization found in the governin

The history of the November 1966 increase
notion that the Commission placed the stam
proval on them and the hypothesis that th
reached and fostered the order of cancellat
are built in practice on the fiction of unwitt
feat such speculation. For example, the C
articulation that only time has been inade
spective elements of the order stand out. F
Commission's statement that the rates prote
shall initially be cancelled and then some
back in Commission abandons efforts at c
idea that economic or other reasons rejected
heard as to the advisability of cancellation
Commission's order of cancellation.

But more than this, the history of the No
increases provides an effective refutation
denial of an interlocutory examination of
the Commission's order of cancellation [illegible]

ing order and denial of an interlocutory injunction are not final judgments of the reviewing court on the merits. The carriers here were complaining of the Commission's new standards of proof in motor carrier revenue cases. Those issues clearly extend beyond the precincts of a single rate proposal. They survive compliance with the Commission's order to cancel. Indeed, resolution to the carriers' satisfaction of the issues raised in this case with respect to standards of proof would have served their purposes well in succeeding investigations such as the November 16th increase investigation, then in full sway. No necessary inference of mootness arises from denial of interlocutory restraint followed by compliance with an order of cancellation. This was demonstrated in *Accelerated Transport-Pony Express* v. *United States*, 227 F. Supp. 815, aff'd per curiam, 379 U.S. 4 (1964). In that case after dissolution of the restraint on the Commission's order, the carriers complied and continued to prosecute the appeal; the three judge court subsequently handed down its decision on the merits; the carriers appealed to the Supreme Court which accepted jurisdiction and affirmed the judgment below.

The government's brief now puts forward a new argument: the counterclaims for restitution and recovery on the injunction bond should indeed have been reserved for determination by a single district judge. But what difference did it make—"the fact that three judges rather than one did consider the question raises no serious problem." Raises no serious problem indeed! Counterclaim for restitution was summarily dismissed and injunction bond peremptorily discharged without benefit of a record; with no opportunity for the shipper appellants to document their counterclaim by probative evidence. The sequence obtained by *Brotherhood* is explained by the government by quoting *United States* v. *I.C.C.*, supra, which states the

policy as one "of limiting the three-judge court procedure within its expressly stated confines." Appellants suggest that *Brashear* stated the policy more pungently: "The motion for damages raised questions not within the statutory purpose for which the two additional judges had been called." The Court cast doubt on the propriety of dismissal of the counterclaim without a hearing on the merits, 312 U.S. 621, 626-627. It seems apt to observe that *Brashear* was decided in 1941. A derangement in the sequence of adjudication, tolerated in a case of first impression, should not find favor with the Court 28 years afterwards. The admonitions and cavcats uttered by the *Brashear* court merit more than the cavalier treatment suggested in the government's brief. Appellants suggest that the judgment of the Court in *United States* v. *I.C.C.*, *supra*, dispositive of the problem there presented, is appropriate for disposition of the instant case—remand to the district court for adjudication of the merits of the complaint.

This supplies the answer too, to the contention that the issue on which the appeal is based, is not so much the ruling on the complaint, as the ruling on the counterclaim. The appellants are of course concerned that a case briefed, argued, and heard on the merits of the complaint should have terminated in a decision on issues not yet heard, and tried in an evidentiary forum. Nevertheless, appellants do not seek from this Court, at this time, a disposition of issues arising under the counterclaim, no more than they sought such a determination from the three-judge court below.* Appellants seek only a judgment on the merits of the complaint.

---

* In their brief to the three-judge court, dated November 12, 1965, appellants (intervenors below) stated (p. 7): "Intervenors have not yet moved for recovery under the indemnity bond or for judgment on the counterclaim . . . both rights are enforceable through the ancillary jurisdiction of this Court by resort to a single judge after a determination on the merits of the complaint by the three-judge court."

Finally, the government speculates as to what the position of the carriers would have been, had the court below ruled in appellant's favor on the constitutional issue. Appellees suggest that such a ruling could not have been made without first considering the complaint on the merits. From such a judgment of dismissal, the carriers remedy would only be to this Court on direct appeal. And, if the government's point is that the appellees themselves sought dismissal of the complaint and thus could not appeal therefrom, the answer must be that the appellees sought only dismissal without prejudice and expressly opposed a dismissal of the complaint on the merits. In that posture, their right to appeal to this Court from a judgment of dismissal on the merits would stand unimpaired. Appellees sought only a judgment ruling that the District Court on the merits of the complaint. It is respectfully suggested that the court below abused its discretion in declining to rule on the merits of the complaint and by dismissing the proceeding without prejudice to the plaintiff carriers. From such a judgment direct appeal lies only to this Court.

## I. Appellees' Motion to Dismiss and to Affirm

## CONCLUSION

Appellants suggest that this court has jurisdiction of the appeal and that its substantiality is such as to warrant notation of probable jurisdiction. The motions of the government parties to dismiss and of the appellees to dismiss and/or affirm, should be, in all respects, denied.

Respectfully submitted,

Arthur A. Ansman
233 Broadway
New York, N. Y. 10007

James A. C. Martin
630 Third Avenue
New York, N. Y. 10017

Richard A. Bowman
3601 Rand Tower Building
Minneapolis, Minnesota 55402

*Attorneys for Appellants*

SUPREME COURT OF THE UNITED STATES